82-5448

No.

In The

Supreme Court of the United States

TIMOTHY WILLIAM UNDERWOOD,

Petitioner,

vs.

STATE OF CALIFORNIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO

THE SUPREME COURT OF CALIFORNIA

John Patrick Dolan
Judith A. Sanders
1072 S.E. Bristol
Santa Ana, CA 92707

Attorneys for Petitioner

I

QUESTIONS PRESENTED FOR REVIEW

I. Whether the appellate courts of the State of California erred by failing to reverse Petitioner's conviction because he was denied his Sixth and Fourteenth Amendment rights by virtue of the fact that the court refused instructions upon a lesser-included offense because it felt that the evidence did not justify the instructions.

II. Whether the appellate courts of the State of California erred by failing to reverse Petitioner's conviction because he was denied his Sixth and Fourteenth Amendment rights by virtue of the fact that the court refused instructions upon a lesser-included offense because it felt that the offense was barred by the statute of limitations.

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TIMOTHY WILLIAM UNDERWOOD,

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STATE OF CALIFORNIA,

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PETITION FOR A WRIT OF CERTIORARI TO

THE SUPREME COURT OF CALIFORNIA

Petitioner, Timothy William Underwood, respectfully prays that a writ of certiorari issue to review the judgment and summary denial of a request for a hearing by the Supreme Court of the State of California on April 21, 1982 following the affirmance of his conviction by an opinion of the Court of Appeal of the State of California, Fourth Appellate District, Division Two, filed February 5, 1982.

Opinion Below

Petitioner's request for a hearing before the California Supreme Court was summarily denied with no opinion filed. A copy of the notice of this denial is included herein as Exhibit A. The opinion of the Court of Appeal of the State of California, Fourth Appellate District, Division Two, was not certified for publication. A copy of said opinion is included herein as Exhibit B.

Jurisdiction

Jurisdiction is conferred upon this Court by 28 U.S.C. Section 1257(3) to review the final judgment of the highest court of a State by writ of certiorari.

Constitutional Provisions

The following United States Constitutional Provisions are involved: U.S. Const. Amend. VI and XIV. The text of those provisions is attached hereto as Appendix C.

Proceedings Below

On June 16, 1980, an Information was filed against Petitioner in the Superior Court of the State of California in and for the County of San Bernardino, charging him with murder (Calif. Penal Code Section 187) and alleging that he

used a firearm during the commission of the offense (Calif. Penal Code Section 12022.5). Petitioner entered a plea of not guilty and denied the use allegation. Thereafter several pretrial motions by both sides were heard. On October 21, 1980 Petitioner's jury trial commenced. On October 30, 1980 a defense motion for a judgment of acquittal as to first degree murder was heard and granted. On that same date, a defense motion to instruct the jury on the lesser offense of voluntary manslaughter was heard and denied.

On November 3, 1980 the jury found Petitioner guilty of second degree murder and found that he had used a firearm during the commission of the offense. Petitioner then waived time for sentencing and was sentenced as prescribed by law.

After conviction and sentence Petitioner filed a timely notice of appeal. The matter was briefed and oral argument heard. Because the Court of Appeal could not reach an opinion within the time prescribed by law, the cause was resubmitted on December 31, 1981 "for the purpose of preparing modification of the proposed opinion and the possible preparation of a separate opinion". A copy of said order is attached hereto as Exhibit D.

On February 5, 1982, the Court of Appeal affirmed Petitioner's conviction in an unpublished opinion. A rehearing of said matter was denied on March 5, 1982. On April 21, 1982 the Supreme Court of California denied a hearing.

Petitioner presently remains incarcerated in the custody of the Department of Corrections of the State of California.

Statement of the Case

On November 9, 1976 a male body was found wrapped in sheets and in a garbage bag in a shallow grave in the Cajon Pass wilderness area of the County of San Bernardino. The body was not then identified but was labeled "John Doe 15-76". The medical examiner found the cause of death to be a gunshot wound in the base of the skull and concluded that death could have occurred any time between approximately July 10, 1976 and October 15, 1976.

In 1979 the sheets in which the body was wrapped were found to have the same laundry markings as those used by a David Watson, a missing person. Parachute straps tied around the body were also similar to cord found at Watson's last known residence. In 1980, dental chart comparisons by two dentists concluded John Doe 15-76 was David Watson.

From mid-1975 through mid-1976 a young woman named Diana Nelson (also known as Coleen Williams) lived with Petitioner. After their relational disengagement Petitioner moved in with David Watson and Diana moved in with her father. Thereafter, for a period of about one and one-half (1½) months Diana dated David Watson. After that she began dating Petitioner again. Subsequently she dated both men at the same time. This created a rivalry between the two men which led to a cessation of communication between them and attempts by both to turn her against the other man. In August of 1976, Diana stopped dating both men. The theory of the prosecution throughout Petitioner's case was that the "love triangle" between the two men and Diana led Petitioner to kill Watson.

Approximately one to three weeks after Diana Nelson stopped dating both men, Petitioner appeared at her residence driving Watson's van. They went to the residence where Petitioner and Watson lived, but Watson was not present. Ms. Nelson testified at trial that after repeatedly asking Petitioner about Watson's whereabouts, he told her "Dave went bye-bye" and that Watson wouldn't be found for a long

time, didn't know what hit him, didn't feel any pain, and that it was a "crime of passion". Despite the fact that on several previous occasions she had denied any knowledge of the circumstances surrounding Watson's disappearance/death, Nelson revealed the above information to police authorities in September of 1979.

During the course of his trial, Petitioner requested that the jury be instructed as to the lesser-included offense of voluntary manslaughter. However, the trial court refused to do so primarily because it felt that the offense was barred by the statute of limitations (three years under California law). Thereafter, Petitioner was convicted of second-degree murder.

Reasons for Granting the Writ

A. THE FAILURE OF THE APPELLATE COURTS OF CALIFORNIA TO REVERSE PETITIONER'S CONVICTION WHERE DEFENSE-REQUESTED INSTRUCTIONS UPON A LESSER-INCLUDED OFFENSE WERE REFUSED IS CONTRARY TO THE PROVISIONS OF THE SIXTH AMENDMENT'S GUARANTEE OF THE RIGHT TO TRIAL BY JURY AND TO THE FOURTEENTH AMENDMENT'S GUARANTEE OF DUE PROCESS.

While the Supreme Court of California chose not to

state its reasons for refusing a hearing in Petitioner's case, it is apparent that it was satisfied with the Court of Appeal's holding that the defense-requested instructions were properly refused as the evidence was insufficient to justify them under the authority of People v. Flannel (1979) 25 Cal.3d 668, 684-85. The Flannel decision, apparently abrogating long-standing California law (see infra), appears to hold that instructions as to lesser-included offenses must be given only when the evidence in support of the lesser offense is "substantial".

Without question the Sixth and Fourteenth Amendments guarantee a defendant the right to trial by jury. Duncan v. Louisiana (1968) 391 U.S. 145. But the right to trial by jury does not merely mean the right to have citizens present in the courtroom. Rather, the guarantee of due process is the right to have the jury adjudicate the facts of a case. Thus, a defendant is entitled to have the jury instructed as to a lesser-included offense which is supported by the evidence. Keeble v. United States (1973) 412 U.S. 205; see also, Beck v. Alabama (1980) 447 U.S. 625. As this Court held in Keeble:

> Moreover, it is no answer to Petitioner's demand for a jury instruction on a lesser offense to argue that a defendant may be better off without such an instruction. True, if the prosecution has not established beyond a reasonable doubt every element of the offense charged, and if no lesser offense instruction is offered, the jury must, as a theoretical matter, return a verdict of acquittal. But a defendant is entitled to a lesser offense instruction -- in this context or any other -- precisely because he should not be exposed to the substantial risk that the jury's practice will diverge from theory. Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction.

412 U.S. at 212-13. The remaining question then is: what standard should be applied in determining whether the evidence supports instruction upon a lesser offense?

Since the function of the jury is to determine whether the evidence is adequate to find a particular fact, any standard which allows the judge to easily remove consideration of a lesser offense from the jury circumvents the function of the jury and essentially deprives a defendant of his due process right to have the jury adjudicate the facts. Thus, 23 Corpus Juris Secundum explains:

> . . . since, . . . the weight and sufficiency of the evidence to establish a fact in issue are a question for the jury, it is generally recognized that any evidence which will authorize the jury to find on it, although in the opinion of the court it may be weak, inconclusive, or unworthy of belief, is sufficient to justify an instruction on the issue raised by such evidence.

at 775-76 (section 1313). To hold that the evidence must be substantial to support instruction upon a lesser offense removes this determination from the jury. Essentially, it makes the court the finder of fact and so deprives a defendant of his right to have the jury make such a determination.

The "substantial evidence" test here applied by the California courts upon the issue of instruction upon lesser included offenses seems inappropriate for a second reason: it shifts the burden of proof to the defendant. Substantial evidence is that evidence which would enable a reasonable jury to find a fact beyond a reasonable doubt. However, a defendant need not prove a lesser degree of an offense beyond a reasonable doubt; he needs only to cast a reasonable doubt about the commission of the greater degree of the offense. As California Supreme Court Chief Justice Bird

explained in her well-reasoned dissent in the Flannel case:

> The law is clear that a criminal defendant has a constitutional right to have a jury determine every material issue presented by the evidence. (See People v. Sedeno, . . . 10 Cal. 3d 703, 720-21 . . .; People v. Modesto (1963) 59 Cal. 2d 722, 730 . . .) Appellant was entitled to the requested diminished capacity instructions under the corollary rule that a trial court "should instruct the jury upon every material question upon which there is any evidence deserving of any consideration whatever. . . . The fact that the evidence may not be of a character to inspire belief does not authorize the refusal of an instruction based thereon. . . . That is a question within the exclusive province of the jury. However incredible the testimony of a defendant may be he is entitled to an instruction based upon the hypothesis that it is entirely true." (People v. Carmen (1951) 36 Cal. 2d 768, 773 . . . .
>
> The lead opinion has confused two concepts. Substantial evidence is the standard applied in criminal appeals when a court must decide whether the evidence produced at trial was sufficient to prove the defendant's guilt beyond a reasonable doubt. That is not the issue in this case. Here, the jury must be given the opportunity to consider his defense. The accused need not prove that defense beyond a reasonable doubt but must show there is a reasonable doubt as to his guilt. Clearly, the substantial evidence standard used in considering the validity of a conviction on appeal is totally inappropriate as a standard for determining when an accused is entitled to instructions on a defense of diminished capacity.

25 Cal. 3d at 687-88.

The long-standing rule in California has been that a defendant is entitled to an instruction upon a lesser offense if there is any evidence deserving of consideration in support of the instruction. People v. Carmen (1951) 36 Cal. 2d 768, 773; see also, People v. Sedeno (1974) 10 Ca. 3d 703, 716; People v. Morse (1969) 70 Cal. 2d 711, 732; People v. Miller (1962) 57 Cal. 2d 821, 829; People v. Lewis (1960) 186 Cal. App. 2d 585, 587. To the extent that the Flannel decision abandons this rule in favor of the "substantial evidence" test, it clearly deprives a defendant of his due process right to have the jury adjudicate the facts of his case. However, even in California, the authoritative force of the Flannel decision is unclear. The lead opinion by Justice Tobriner was joined only by Justices Mosk and Newman. 25 Cal. 3d at 686. Thereafter, Justice Mosk favored a rehearing of the matter. Id. at 690.

Analysis of the instant case under the traditional "any evidence deserving of consideration" test reveals that petitioner was entitled to have the jury instructed as to the lesser offense of voluntary manslaughter. The prosecu-

tion in its case in chief presented evidence that there was a "love triangle" between petitioner, David Watson and Diana Nelson. This led to a rivalry between the two men, cessation of communication between the two men, and numerous attempts by each man to turn Diana against the other man. Finally, the prosecution presented evidence that the killing was a "crime of passion". Since the prosecution itself presented this evidence, it should have been bound by it. See People v. Collins (1961) 189 Cal. 2d 575, 591; People v. Coppla (1950) 100 Cal. App. 2d 766, 769. Such evidence was clearly adequate to give rise to some doubt as to whether the crime was murder or manslaughter, thus giving rise to the necessity of instructing the jury as to voluntary manslaughter.

It is also of significance in the instant case that the trial court's ruling occurred before the defense rested. The trial court indicated that it would not give the manslaughter instructions primarily because it felt the offense was barred by the statute of limitations. While the court said that it would allow counsel to present authorities on the issue, it was clear before

the defense rested that the court did not intend to give the requested manslaughter instructions. Faced with this ruling by the court there was little the defense could do. No reasonably competent defense attorney could place his client on the stand to admit the killing but testify as to circumstances which would constitute manslaughter as this would withdraw the only possible remaining defense (i.e., that petitioner was not the killer). Moreover, faced with an admission of the deed the jury would certainly convict the petitioner, even if some doubt appeared in their minds as to the requisite intent. See Keeble v. United States, supra, 412 U.S. at 213. The effect was to deprive petitioner of his right to testify in his own defense.

The cumulative effect of the trial and appellate courts' actions herein has been to deprive petitioner of his due process rights and specifically to deprive him of his right to a trial by jury and to testify in his own behalf. Accordingly, it is submitted that the court's refusal to instruct upon the lesser offense of voluntary manslaughter was reversible error and the

failure of the Supreme Court of California to recognize same should be reviewed by this Court.

B. THE STATUTE OF LIMITATIONS WAS NO BAR TO GIVING THE REQUESTED VOLUNTARY MANSLAUGHTER INSTRUCTIONS.

While the Court of Appeal relied upon the sufficiency of the evidence rationale to reject petitioner's contention that voluntary manslaughter instructions should have been given, the trial court relied primarily upon the statute of limitations in rejecting petitioner's request. Because the filing of criminal charges came more than three years after the offense the court felt the offense was barred by the statute of limitations so it would be improper to instruct the jury upon it.

While the statute of limitations is normally regarded as jurisdictional and so a defense based upon it is not waived by a defendant's failure to raise it at an early stage of the proceedings, there is no reason apparent why a defendant with knowledge of the defense could not waive it. Surely if a defendant can waive such fundamental rights

as the rights to counsel and trial by jury, he can waive the statutory right of a defense based upon the statute of limitations. The analysis in Keeble, supra p. 7-8, seems particularly appropriate here: a defendant might well make a strategic choice to waive the statute of limitations to avoid the jury having to choose between acquittal and conviction of a higher offense where it was clear that some offense had been committed. Failure to allow a defendant to do so again deprives the defendant to his right to have the jury adjudicate the facts and his right to due process.

The facts of the instant case make the above argument particularly compelling. The body of David Watson was discovered in November of 1976. In September of 1979 Diana Nelson, the prosecution's star witness, revealed petitioner's confession to police authorities. Thus, the prosecution had sufficient evidence to charge petitioner within the period of the statute of limitations. However, no charges were filed until 1980 -- precluding, in the trial court's analysis, a finding of voluntary manslaughter. However, petitioner was blameless in this

situation. For whatever reason the prosecution delayed filing against petitioner, he had nothing to do with it. Surely a defendant cannot be deprived of his right to have the jury evaluate the facts of his case merely because the prosecution has delayed filing charges until after the statute of limitations has run as to a lesser-included offense.

In the instant case where the prosecution had sufficient evidence to charge petitioner but delayed filing charges until after the statute of limitations had run on a lesser-included offense, the court's failure to allow the petitioner to waive the statute of limitations clearly deprives petitioner of his Sixth and Fourteenth Amendment rights. Therefore, it is submitted that review by this court is necessary to correct this error.

Conclusion

Based upon the facts of this case and the foregoing arguments and authorities, it is respectfully submitted that the petition for writ of certiorari should be

granted.

Dated: June 19, 1982

Respectfully submitted,

DOLAN & SANDERS

John Patrick Dolan

Judith A. Sanders
1072 S.E. Bristol
Santa Ana, California 92707

Attorneys for Petitioner

Appendix A: Denial of Hearing in the California Supreme Court

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING
SAN FRANCISCO, CALIFORNIA 94102

APR 2 1 1982

I have this day filed Order

HEARING DENIED

In re: 4 Crim. *No.* 12479

People

vs.

Timothy W. Underwood

Respectfully,

Clerk

Appendix B: Opinion of the Court of Appeal of the State of California, Fourth Appellate District, Division Two

COURT OF APPEAL, FOURTH DISTRICT

DIVISION TWO

STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. TIMOTHY WILLIAM UNDERWOOD, Defendant and Appellant.	4 Crim. 12479 (Super.Ct.No. SCR 36995) O P I N I O N

APPEAL from the Superior Court of San Bernardino County. Don A. Turner, Judge. Affirmed.

Dolan, Sanders & Mogin, John P. Dolan and Judith A. Sanders for Defendant and Appellant.

George Deukmejian, Attorney General, and Steven H. Zeigen, Deputy Attorney General, for Plaintiff and Respondent.

Defendant was convicted of second degree murder and the jury found true the allegation he used a firearm, within the meaning of Penal Code section 12022.5, during the commission of the offense. His only claim of error on appeal is that the trial court failed to instruct the jury on the lesser included offense of voluntary manslaughter. The court did not so instruct, because it found that the statute of limitations barred a prosecution for manslaughter and that there was insufficient evidence to

support a charge of manslaughter. We affirm, because we agree that there is not enough evidence to require the giving of the requested jury instruction.

FACTS

On November 9, 1976, an unidentified body, wrapped in linens which were tied with nylon strapping, was discovered inside a large plastic trash bag buried in a shallow grave near Cajon Pass in San Bernardino County. An autopsy failed to reveal the victim's identity. The body was tagged John Doe No. 15-76 (hereafter John Doe).

The pathologist who performed the autopsy on John Doe formed the opinion that death was caused by a gunshot wound to the base of the skull and had occurred from two weeks to four months prior to the discovery of the body.

In mid-1975 Diane Langley began living with defendant. When she left defendant in June 1976, she moved in with her father. Defendant moved in with the victim, John David Watson, Jr. Diane dated Watson for one and one-half months, and then dated both men for a short period of time.

During the latter period of time, defendant and Watson began to say negative things about each other to Diane. At one point the two men were not speaking to one another. Diane stopped seeing both men during the latter part of August 1976 because she did not like the rivalry that had developed between the two men. She never saw David Watson again.

Several weeks later, Diane observed defendant driving Watson's blue van. When she asked defendant what had become of Watson, defendant replied Watson had gone "bye bye," he would not be found for a long time, he did not know what hit him, he did not feel any pain, and "It was a crime of passion."

In July 1979, Beverly Ann Whittenberg went to the San Bernardino County Sheriff's Department to report her brother John David Watson, Jr. missing. She spoke with Detectives Bill Arthur and James Bailey. During the ensuing investigation, John Doe was exhumed and identified as John David Watson, Jr.

Defendant was charged with Watson's murder (Pen. Code, § 187) in an information filed on June 16, 1980. He was convicted of second degree murder and the jury found true the allegation he used a firearm within the meaning of Penal Code section 12022.5 during the commission of the offense. He appeals from this judgment.

DISCUSSION

A court has the duty to instruct the jury on every material question upon which there is any evidence deserving of any consideration whatever. Such evidence, however, must be substantial. There is no obligation to instruct on a particular theory of the case if the evidence supporting that theory is minimal and insubstantial. (People v. Flannel (1979) 25 Cal.3d 668, 684-685.)

Defendant sought to have the jury instructed on the crime of manslaughter. The trial court refused to give manslaughter

instructions, because, inter alia, there was no substantial evidence to support that theory of the case. We agree.[1/]

The difference between murder and manslaughter is that murder is the unlawful killing of a human being with malice aforethought (Pen. Code, § 187) while manslaughter is the same killing done without malice (Pen. Code, § 192). Therefore, it is voluntary manslaughter, but not murder, when the killing is done either upon a sudden quarrel or heat of passion. (Id.)

In the present case, there is no substantial evidence that the killing was done upon a sudden quarrel or heat of passion. The only evidence that remotely supports such a theory is that defendant, the victim, and Diane Langley had in the past been involved in a "love triangle" and that defendant told Diane that it was a crime of passion. This is minimal evidence that the killing occurred because of their male rivalry and does not even assert a sudden quarrel or heat of passion. It tells the jury nothing about the events contemporaneous with the victim's death. To arrive at a manslaughter verdict, the jury would have had to engage in sheer

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1/ Because we affirm on the lack of substantial evidence grounds, we need not decide the propriety of the trial court's alternate ruling that manslaughter instructions were improper since a conviction for manslaughter was barred by the statute of limitations.

It is uncertain whether a defendant is entitled to an instruction on a lesser included offense that is time-barred. One case held that there is no such right (People v. Vallerga (1977) 67 Cal.App.3d 847, 882-883), while another case indicated that the right did exist (People v. Morgan (1977) 75 Cal.App.3d 32, 37, fn. 1; see also Keeble v. United States (1973) 412 U.S. 205 [36 L.Ed.2d 844, 93 S.Ct. 1993]; Padie v. State (Alaska 1976) 557 P.2d 1138.)

speculation. The trial court was thus correct in not giving manslaughter instructions to the jury.

The judgment of conviction is affirmed.

/s/ Morris
Acting P. J.

We concur:

/s/ McDaniel
J.

/s/ Gardner
J.*

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*Retired Presiding Justice of the Court of Appeal sitting under assignment by the Chairperson of the Judicial Council.

Appendix C: Constitutional Provisions

AMENDMENT 6

Rights of the accused.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

AMENDMENT 14

Section 1. Citizens of the United States.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Appendix D: Order for Resubmission by the Court of Appeal of the State of California

COURT OF APPEAL—STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

vs.

TIMOTHY WILLIAM UNDERWOOD,
Defendant and Appellant.

4 Crim. NO. 12479

COUNTY NO. SCR 36995

THE COURT:

Pursuant to Rule 22.5, California Rules of Court, the submission is hereby vacated and the cause resubmitted as of this date.

The reason submission is vacated is that differences of opinion among the judges on the panel to which the cause was submitted have not been resolved. Additional time will be required for the purpose of preparing modification of the proposed opinion and the possible preparation of a separate opinion.

I concur:

/s/ McDaniel
J.

/s/ Morris
Acting Presiding Justice

C.C.

VERIFICATION BY PARTY (446, 2015.5 C. C. P.)

STATE OF CALIFORNIA, COUNTY OF

I am the _____

_____

in the above entitled action; I have read the foregoing _____

_____

and know the contents thereof; and I certify that the same is true of my own knowledge, except as to those matters which are therein stated upon my information or belief, and as to those matters I believe it to be true.

_____

_____

I declare, under penalty of perjury, that the foregoing is true and correct.

Executed on _____ *(date)* *at* _____ *(place)*, *California*

_____

Signature

PROOF OF SERVICE BY MAIL (1013a, 2015.5 C. C. P.)

STATE OF CALIFORNIA, COUNTY OF

I am a resident of the county aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is:

1072 S. E. Bristol, Santa Ana, CA 92707

On June 19, *19* 82, *I served the within* Petition for Writ of Certiorari

on the see below *in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at* Placentia, CA *addressed as follows:*

San Bernardino Superior Court, 351 N. Arrowhead Ave, San Bernardino, CA 92415

San Bernardino District Attorneys Office, 351 N. Arrowhead Ave., San Bernardino, CA 92415

Attorney General's Office, 110 W. "A" Street, Ste. 600, San Diego, CA 92101

Court of Appeal, Fourth District, Div. Two, 640 State Bldg., 303 W. Third St., San Bernardino, CA 92401

Supreme Court of California, 4250 State Bldg., 350 McAllister St., San Francisco, CA 94102

I declare, under penalty of perjury, that the foregoing is true and correct.

Executed on June 19, 1982 *(date)* *at* Placentia *(place)*, *California*

_____

Signature

No. 82-5448

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1982

TIMOTHY WILLIAM UNDERWOOD,

Petitioner,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL
FOR THE FOURTH APPELLATE DISTRICT,
DIVISION TWO

BRIEF OF RESPONDENT IN OPPOSITION

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No. 82-5448

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1982

TIMOTHY WILLIAM UNDERWOOD,

Petitioner,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL FOR THE FORTH APPELLATE DISTRICT, DIVISION TWO

BRIEF OF RESPONDENT IN OPPOSITION

OPINIONS BELOW

The California Court of Appeal, Fourth Appellate District, Division Two, received petitioner's direct appeal from the judgment of conviction, and, in an unpublished opinion filed February 5, 1982, (People v. Underwood, 4 Crim. 12479), found no merit to petitioner's contention and affirmed the judgment. (Appendix A.)

After the Court of Appeal's denial of appellant's petition for a rehearing on March 5, 1982, (Appendix B), the California Supreme Court denied petitioner's petition for hearing on April 21, 1982. (Appendix C.)

JURISDICTION

This Court has jurisdiction to consider this case pursuant to 28 U.S.C. 1257.

QUESTION PRESENTED

Whether the failure to instruct on a lesser included offense because California decisional law requires evidence be presented warranting such an instruction, raises a substantial federal question.

STATEMENT OF THE CASE

An information filed June 16, 1980, by the San Bernardino County District Attorney charged petitioner with

committing murder, Pen. Code, § 187), during which he used a firearm in violation of Penal Code section 12022.5. (CT 3.)

Petitioner was arraigned, pled not guilty to the charge, and denied the weapons allegation. (CT 4.)

Petitioner proceeded to jury trial during which his motion for an acquittal as to first degree murder was granted. (CT 33-34.) Following the trial court's refusal to instruct the jury in accordance with voluntary manslaughter (CT 35), the jury, on November 3, 1980, found petitioner guilty of second degree murder as charged in the information. The weapons allegation was found to be true. (CT 38-39, 44-45.)

Petitioner was sentenced to an indeterminate sentence in the state prison for the term prescribed by law.

(CT 39, 96.)

Petitioner's conviction was affirmed by the California Court of Appeal, Fourth Appellate District, Division Two, in an unpublisehd opinion filed February 5, 1982. (Appendix A.)

The California Supreme Court denied petitioner's request for a hearing on April 21, 1982. (Appendix C.)

STATEMENT OF FACTS

On November 9, 1976, San Bernardino County Sheriff Deputy Michael Stodelle discovered a body in a small canyon off a dirt road in the vicinity of Cajon Pass. The body was found in a shallow grave, and was covered with sheets around which nylon wrapping had been packed. It had been placed in a greenish colored pastic trash bag and buried. The label on the sheet read, "The House of Cleanliness," which was a

logo used by the Quality Linen Service. The body was taken to the Mark B. Shaw Mortuary in San Bernardino where an autopsy was performed. It was then tagged as "John Doe, 15-76" after the autopsy failed to reveal the identity of the body. (RT 442-453.)

Dr. Irving Root performed the autopsy. Cause of death was determined to be a gunshot wound to the base of the skull, entering just below the mastoid on the left side, which penetrated the spinal cord as it exited the brain at the base of the skull. A silver material appearing on a portion of the skull indicated the shot came from a very close firing range. Due to the degree of decomposition of the body, the time of death could only be approximated as several weeks to several months before the discovery of the body. The wound observed would be consistent

with coming from a .45 caliber weapon.

Daivd Watson first came to California in 1975 and took up residence with his sister Beverly Whittenberger in September of that year. Watson first met petitioner in October 1975 and the two became friends. They began renting a house together in June 1976. On September 1, 1976, Ms. Whittenberger saw her brother driving a blue Ford van which he had purchased while Ms. Whittenberger was on a trip to Indiana. Watson told his sister there was going to be a party on September 3, 1976. Ms. Whittenberger, who never made it to the party, never saw her brother again. (RT 560-566.)

Diana Langley lived with appellant from mid 1975 through mid 1976. She first broke up with appellant in June 1976, at which time she moved in with her father, and petitioner moved in with

David Watson. Diana then began dating Watson. Their relationship lasted about one-and-a-half to two months, at which time she began dating petitioner again. During this time, petitioner and Watson would play "head" games , trying to turn Diana against each other by saying things behind each other's backs. When Diana became tired of the games she left petitioner during the latter part of August 1976. At the time Diana left, Watson told her he would have planned to marry her later. That was the last time Diana saw Watson. (RT 673-682.)

Two or three weeks later, Diana saw petitioner driving Watson's blue van. Nobody had ever driven that van but Watson. (RT 678.) When Diana asked petitioner where Watson was, petitioner finally said, "Dave, went bye-bye." Petitioner also stated Watson would not be found for a long

time. In addition, petitioner said, "He [Watson] didn't know what hit him;" that he felt no pain. Petitioner also remarked something about a "crime of passion." Petitioner told Diana not to tell anyone she had seen him that day. (RT 682-685.)

Approximately two weeks later, petitioner called Diana from the Ventura County Jail. He asked Diana to go to the house petitioner had shared with Watson and move all the belongings to storage, while getting rid of Watson's personal effects. Diana was told to make it look like Watson had taken off somewhere. He also said to call Beverly Whittenberger and tell her petitioner was in jail, and that he did not know Watson's whereabouts. (RT 687-688.)

Diana never told anybody about petitioner's behavior because she still had feelings for him at the time and

because she was scared. She finally related the sequence of events to detectives in September 1979, after being informed she could be prosecuted as an accomplice. (RT 699-701.)

In September 1976, Danny Stark owned a 1966 Lincoln Continental. He traded the car for a blue 1965 Ford van. When he traded for the van, the man he purchased it from removed a duffel bag of clothing and cleaned out what appeared to be sandy dirt from within the van. About a day after the trade, Stark received a notice his car had been impounded in Ventura. Approximately a week later, Stark spoke with Ms. Whittenberger and said her brother must be in jail since the person he traded the car to was identified as her brother. (RT 627-634.)

On September 5, 1976, Detective Don Lanning of the Oxnard Police Department

arrested petitioner in that Ventura County town for the robbery of a local Sambo's Restaurant. Petitioner was driving a 1966 Lincoln Continental in which was found a shoulder holster for a weapon. A loaded .45 caliber Colt, government model automatic was found at the scene of the robbery. After being booked in the Ventura County Jail, petitioner placed a call to Colleen Williams, a name used by Diana Langley at the time to get into bars. (RT 603-617, 619-620, 676.)

Approximately seven to ten days after last seeing her brother on September 1, 1976, Ms. Whittenberger noticed a For Rent sign in the front of his house. The landlady told her the boys were moving out and that Diana had been by to get their things because they were already up north. Two days later, Ms. Whittenberger met with Diana and they went to Watson's former

bedroom. It was empty. Among Watson's possessions which were missing was a black briefcase in which Watson had kept a .45 caliber gun and a smaller weapon. In the garage was Watson's motorcycle and the sheets and parachute cord which Watson had used in his linen service. One of the snaps of the sheet had been opened. (RT 568-573.)

Ms. Whittenberger then went to a U & I auto parts store where she saw her brother's van. She spoke with the van's new owner, Danny Stark, who said he had bought a vehicle from a man identified as Wayne Espinoza, an alias used by Watson. (RT 561.) Stark then told Ms. Whittenberger he thought her brother was in jail because of the impound notice he had received. When she called the Ventura County Jail Ms. Whittenberger did not locate a Wayne Espinoza but later found petitioner who

had used the name Timothy Britton. Ms. Whittenberger did not see petitioner until he was released from jail. When she asked him where her brother was, petitioner replied, "The last time I saw him he was headed for Las Vegas" driving the van. Asked how Watson could be driving the van when petitioner had traded it to Stark, petitioner said Watson had owed him money and had given him the van in exchange. (RT 574-577.)

In 1979, Ms. Whittenberger went to the sheriff's department to report a missing person. There she talked with Detective Jim Bailey. As Ms. Whittenberger related the circumstances of her brother's disappearance, Detective Bill Arthur, one of the deputy's who had discovered the body, overheard the conversation and felt it may relate to relate to the body designated "John Doe 15-76." When a piece

of sheet in Ms. Whittenberger's possession matched that found on the body the investigation was renewed. (RT 578-580, 621-624.)

On October 1, 1980, the body of "John Doe, 15-76" was exhumed. On October 21, 1980, the skull and the jaw of the body was examined against the dental records of David Watson. The body was thereafter identified as being that of David Watson. (RT 456-457, 477-482.)

* * * * *

ARGUMENT

PETITIONER'S CONTENTION FAILS TO RAISE A SUBSTANTIAL FEDERAL QUESTION SINCE CALIFORNIA DECISIONAL LAW REQUIRING MORE THAN TRIVIAL EVIDENCE BE PRESENTED BEFORE A LESSER INCLUDED OFFENSE INSTRUCTION IS WARRANTED DOES NOT RESULT IN ANY DUE PROCESS VIOLATION OR ANYTHING LESS THAN A FAIR TRIAL

Petitioner alleges the failure of the trial court to instruct on the lesser included offense of voluntary mansalughter resulted in a denial of due process and a fair trial. As will be demonstrated, California's judicially created policy requiring there be evidence of substance before an instruction is mandated is perfectly proper.

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While petitioner purports to present two reasons to this Court for granting his writ, there is, in essence, but one. That is so because, in affirming petitioner's conviction, the Court of Appeal specifically concluded there was insufficient evidence upon which to justify the giving of a lesser included offense instruction. Thus, the only question presented through the petition is whether California decisional law, as exemplified by the decision in People v. Flannel (1979) 25 Cal.3d 688, validly requires more than trivial evidence be presented before an

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instruction on a lesser included offense becomes required. Respondent submits the California procedure does not in the least impinge on any due process right and does not adversely affect the receipt of a fair trial. Accordingly, it is a question of fact for the California courts to resolve and, therefore, no substantial federal question has been presented which would warrant the consideration of this Court.

As the statement of facts, supra, reveals, the physical findings concerning the cause of death of the victim belie any contention that the crime committed was less than murder. The gun was placed so close to the victim's head that the muzzle almost touched its target. Moreover, the entrance of the bullets indicated the victim was either shot from behind or while he was asleep. Thereafter, of course, great pains were

taken to dispose of the body which was not discovered until it had become badly decomposed. While petitioner suggests the homicide was the culmination of a "lover's triangle," this root cause of the crime does not remove the obvious intent with which the killing was accomplished.

Of equal importance, and something petitioner ignores, is the fact at the time the trial court discussed instructions with counsel it concluded (1) that no instruction on first-degree murder would be given (RST 16, lns. 5-10)[1] and (2) that the jury "probably will not receive a verdict of manslaughter." (RST 16, lns. 23-25.) Thereafter, counsel did not pursue the question any further.

The case about which petitioner

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1. RST refers to the reporter's supplemental transcript on appeal of the proceedings held October 29 and 30, 1980.

really complains is People v. Flannel, supra, 25 Cal.3d at p. 668. While petitioner alleges the Flannel decision altered the barometer for determining when an instruction was warranted, such is not the case. Rather, the California Supreme Court chose to delineate the quantum of evidence necessary for instructing the jury on an issue of law, while being cognizant of the jury's role to determine the credibility of the witnesses presented. Thus, the trial court, as in every evidentiary consideration, was to determine whether there was evidence presented which was deserving of the jury's consideration. Accordingly, when the evidence is "minimal or insubstantial" no instruction should be given. When , however, any theory of the case is supported by substantial evidence and instruction on that theory is required. (Id., at pp. 668, 685.)

This state created policy for determining when an instruction is appropriate simply does not infringe on any of the constitutional rights attending to a jury trial. While instructional issues can present serious questions of constitutional dimensions (see for example Taylor v. Kentucky (1978) 436 U.S. 478,[56 L.Ed.2d 468, 98 S.Ct. 1930])

> "It must be established not merely that the instruction is undesirable, erroneous, or even 'universally condemned', but that it violated some right which was guaranteed to the defendant by the Fourteenth Amendement." (Cupp v. Naughten (1973) 414 U.S. 141, 147 [38 L.Ed.2d 368, 373 94 S.Ct. 396.)

Thus, this Court in Cupp recognized,

> "A judgment of conviction is commonly the culmination of a trial which includes testimony of witnesses, argument of counsel, receipt of exhibits in evidence, and instrucion of the jury by the judge." (Cupp v. Naughten, supra, 414 U.S. at p. 147.)[2/]

Simply stated, this judicially declared rule of California procedure affects no constitutionally guaranteed right. As a result, petitioner's contention raises no substantial federal question. As this Court stated in

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2. Petitioner's reference to Keeble v. United States (1973) 412 U.S. 205, [36 L.Ed.2d 844, 93 S.Ct. 1993] is inappropriate since that case emanated from a federal prosecution under the Major Crimes Act of 1885 regarding the commission of crimes by Indians on a reservation. There was no review of a judicially created state criminal procedure.

Sugarman v. United States (1918) 249 U.S. 182, 184, [63 L.Ed. 550, 551],

> ". . . Mere reference to a provision of the Federal Constitution, or the mere assertion of a claim under it, does not authorize this Court to review a criminal proceeding; and it is our duty to decline jurisdiction unless the writ of error presents a constitutional question substantial in character an properly raised below."

Petitioner has done nothing more than refer to his claim as involving the Federal Constitution. Under these circumstances, then, the request for a writ of certiorari should be denied.

* * * * *

CONCLUSION

For the foregoing reasons respondent respectfully requests the petition for writ of certiorari be denied.

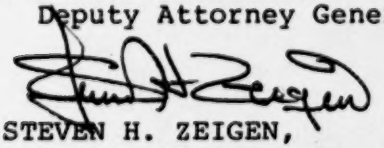
Respectfully submitted,

GEORGE DEUKMEJIAN,
Attorney General

ROBERT H. PHILIBOSIAN,
Chief Assistant Attorney General--Criminal Division

DANIEL J. KREMER,
Assistant Attorney General

A. WELLS PETERSEN,
Deputy Attorney General



STEVEN H. ZEIGEN,
Deputy Attorney General

Attorneys for Respondent

SHZ:ab
82US0007
11/29/82

[Filed February 5, 1982]

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL

FOURTH APPELLATE DISTRICT

DIVISION TWO

STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,	4 CRIM. 12479
Plaintiff and Respondent,	(Sup. Ct. No. SCR 36995)
v.	
TIMOTHY WILLIAM UNDERWOOD,	O P I N I O N
Defendant and Appellant.	

APPEAL from the Superior Court of San Bernardino County. Don A Turner, Judge. Affirmed.

Dolan, Sanders & Mogin, John P. Dolan and Judith A. Sanders for Defendant and Appellant.

George Deukmejian, Attorney

General and Steven H. Zeigen, Deputy Attorney General, for Plaintiff and Respondent.

Defendant was convicted of second degree murder and the jury found true the allegation he used a firearm, within the meaning of Penal Code section 12022.5, during the commission of the offense. His only claim to error on appeal is that the trial court failed to instruct the jury on the lesser included offense of voluntary manslaughter. The court did not so instruct, because it found that the statute of limitations barred a prosecution for manslaughter and that there was insufficient evidence to support a charge of manslaughter. We affirm, because we agree that there is not enough evidence to require the giving of the requested jury instruction.

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FACTS

On November 9, 1976, an unidentified body, wrapped in lines which were tied with nylon strapping, was discovered inside a large plastic trash bag buried in a shallow grave near Cajon Pass in San Bernardino County. An autopsy failed to reveal the victim's identity. The body was tagged John Doe No. 15-76 (hereafter John Doe.)

The pathologist who performed the autopsy on John Doe formed the opinion that death was caused by a gunshot wound to the base of the skull and had occurred from two weeks to four months prior to the discovery of the body.

In mid-1975 Diane Langley began living with defendant. When she left defendant in June 1976, she moved in with her father. Defendant moved in with the victim, John David Watson, Jr. Diane

dated Watson for one and one-half months, and then dated both men for a short period of time.

During the latter period of time, defendant and Watson began to say negative things about each other to Diane. At one point the two men were not speaking to one another. Diane stopped seeing both men during the latter part of August 1976 because she did not like the rivalry that had developed between the two men. She never saw David Watson again.

Several weeks later, Diane observed defendant driving Watson's blue van. When she asked defendant what had become of Watson, defendant replied Watson had gone "bye-bye," he would not be found for a long time, he did not know what hit him, he did not feel any pain, and "It was a crime of passion."

In July 1979, Beverly Ann

Whittenberg went to the San Bernardino County Sheriff's Department to report her brother John David Watson, Jr. missing. She spoke with Detectives Bill Arthur and James Bailey. During the ensuing investigation, John Doe was exhumed and identified as John David Watson, Jr.

Defendant was charged with Watson's murder (Pen. Code, § 187) in an information filed on June 16, 1980. He was convicted of second degree murder and the jury found true the allegation he used a firearm within the meaning of Penal Code section 12022.5 during the commission of the offense. He appeals from this judgment.

DISCUSSION

A court has the duty to instruct the jury on every material question upon which there is any evidence deserving of any consideration whatever. Such evidence

however, must be substantial. There is no obligation to instruct on a particular theory of the case if the evidence supporting that theory is minimal and insubstantial. (People v. Flannel (1979) 25 Cal.3d 668, 684-685.)

Defendant sought to have the jury instructed on the crime of manslaughter. The trial court refused to give manslaughter instructions, because, inter alia, there was no substantial evidence to support that theory of the case. We agree.[1/]

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The difference between murder and manslaughter is that murder is the unlawful killing of a human being with malice aforethought (Pen. Code, § 187) while manslaughter is the same killing done without malice (Pen. Code, § 192.) Therefore, it is voluntary manslaughter, but not murder, when the killing is done either upon a sudden quarrel or heat of passion. (Id.)

1/ Because we affirm on the lack of substantial evidence grounds, we need not decide the propriety of the trial court's alternate ruling that manslaughter instructions were improper since a conviction for manslaughter was barred by the statute of limitations.

It is uncertain whether a defendant is entitled to an instruction on a lesser included offense that is time-barred. One case held that there is no such right (People v. Vallerga (1977) 67 Cal.App.3d 847, 882-883), while another case indicated that the right did exist (People v. Morgan (1977) 75 Cal.App.3d 32, 37, fn. 1; see also Keeble v. United States (1973) 412 U.S. 205 [36L.Ed.2d 844, 93 S.Ct. 1993]; Padie v. State (Alaska 1976) 557 P.2d 1138.)

In the present case, there is no substantial evidence that the killing was done upon a sudden quarrel or heat of passion. The only evidence that remotely supports such a theory is that defendant, the victim, and Diane Langley had in the past been involved in a "love triangle" and that defendant told Diane that it was a crime of passion. This is minimal evidence that the killing occurred because of their male rivalry and does not even assert a sudden quarrel or heat of passion. It tells the jury nothing about the events contemporaneous with the victim's death. To arrive at a manslaughter verdict, the jury would have had to engage in sheer speculation. The trial court was thus correct in not giving manslaughter instructions to the jury.

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The judgment of conviction is affirmed.

/s/ Morris
Acting P.J.

We concur:

/s/ McDaniel
J.

/s/ Gardner
J.*

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*Retired Presiding Justice of the Court of Appeal sitting under assignment by the Chairperson of the Judicial Council.

[Filed March 5, 1982]

COURT OF APPEAL

FOURTH APPELLATE DISTRICT

DIVISION TWO

STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Respondent, v. TIMOTHY WILLIAM UNDERWOOD, Appellant.	4 CRIM. 12479 San Brdno. County No. 36955

THE COURT:

The petition for rehearing is DENIED.

Morris, J.
Acting Presiding Justice

cc; County Clerk, San Brdno Co., 351 N. Arrowhead San Brdno, CA 92401
Atty. Gen. 110 W. A St. San Diego CA 92101
District Atty. of San Brdno Co.
Dolan & Sanders 1072 S.E. Bristol, Santa Ana, CA 92707

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING

SAN FRANCISCO, CALIFORNIA 94102

APR 21 1982

I have this day filed Order

81D70180
HEARING DENIED 4/14/82

In re: 4 Crim. *No.* 12479

People

vs.

Timothy W. Underwood

Respectfully,

Clerk

AFFIDAVIT OF SERVICE BY MAIL

ATTORNEY:

George Deukmejian
Attorney General
Steven H. Zeigen,
Deputy Attorney General
110 West A Street, Suite 700
San Diego, California 92101

No. 82-5448

TIMOTHY WILLIAM UNDERWOOD,
Petitioner,

v.

THE PEOPLE OF THE STATE
OF CALIFORNIA,
Respondent

I, CLIFFORD REED, being duly sworn, depose and say: I am a citizen of the United States, over 18 years of age, employed in the County of San Diego, in which county the within mentioned mailing occurred, and not a party to the subject cause; my business address is 110 West A Street, Suite 700, San Diego, California 92101.

I served three copies of the BRIEF OF RESPONDENT IN OPPOSITION (ON PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL FOR THE FOURTH APPELLATE DISTRICT, DIVISION TWO) on the following, by placing same in envelopes addressed as follows:

John P. Dolan, Esq.
Judith A. Sanders, Esq.
1072 S.E. Bristol St.
Santa Ana, CA 92702

Dennis Kottmeier
District Attorney
316 N. Mt. View Ave.
San Bernardino, CA 92415

V. Dennis Wardle
County Clerk
Courthouse Addition
351 N. Arrowhead Ave.
San Bernardino, CA 92415
for del. to Hon. Don A Turner,
Judge

Keenan Casady, Clerk
Court of Appeal
Fourth Appellate District
Division Two
303 West Third St.
San Bernardino, CA 92401

Laurence P. Gill, Clerk
California Supreme Court
3580 Wilshire Blvd.
Room 213
Los Angeles, CA 90010

Each envelope was then sealed and with the postage prepaid deposited in the United States mail by me at San Diego, California on December 6, 1982.

There is a delivery service by United States mail at the place so addressed or regular communication by United States mail between the place of mailing and the place so addressed.

I declare under penalty of perjury that the foregoing is true and correct, and this declaration was executed on December 6, 1982, at San Diego, California.

Clifford Reed
Clifford Reed

Subscribed and sworn to
this 6thday
of December, 1982.

Vida M Allen
NOTARY PUBLIC in and for the County
of San Diego, State of California

VIDA M. ALLEN
NOTARY PUBLIC—CALIFORNIA
COUNTY OF SAN DIEGO
My commission expires Aug. 20, 1986